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No. 90-660

Supreme Court, U.S.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1990

LYNN JAY FERRIN, PETITIONER

v.

HERMAN DI MARTINI

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

JOHN G. ROBERTS, JR.
*Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217*

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Shortly before we filed the petition in this case, this Court granted certiorari in *Siebert v. Gilley*, No. 90-96 (Oct. 15, 1990). Although the issues in the two cases are not identical, both cases involve questions regarding the appropriate standards for pretrial adjudication of qualified immunity claims in *Bivens* actions. The decision in *Siebert* therefore could affect the proper disposition here. Accordingly, our petition urged the Court to grant certiorari and to set this case for oral argument in tandem with *Siebert*. That course is no longer possible, since *Siebert* has been scheduled for oral argument on February 19, 1991. We therefore believe that this petition should be held pending the decision in *Siebert*.

Plenary review may be unnecessary depending on the Court's decision in *Siebert*. If the Court's decision in *Siebert*

bears on the Fed. R. Civ. P. 56 question resolved by the Ninth Circuit in this case, the appropriate course may be to vacate the judgment below and remand this case to the Ninth Circuit for reconsideration in light of the decision. But if this Court does not address the Rule 56 question in *Siegert*, we believe that plenary review of this case would still be warranted. For that reason, this petition should be held pending the decision in *Siegert* and should then be disposed of as appropriate in light of the Court's decision.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General **

FEBRUARY 1991

* The Solicitor General is now disqualified in this case.

